SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 14, ORIGINAL.

EX PARTE: IN THE MATTER OF THE AMERICAN CONSTRUCTION COMPANY, PETITIONER.

Certificate of the Clerk of the Circuit Court of the United States for the Northern District of Florida of filing mandate from the United States Circuit Court of Appeals for the Fifth Circuit in the Case of the Jacksonville, Tampa & Key West Railway Company, Appellant, vs. The American Construction Company, No. 77, November Term, 1892, and Certified Copy of said Mandate.

1 In the U. S. Circuit Court, 5th Circuit, Northern District of Florida.

AMERICAN CONSTRUCTION COMPANY
vs.
JACKSONVILLE, TAMPA & KEY WEST RAILWAY COMPANY.

I, Philip Walter, clerk of the U. S. circuit court, 5th circuit, northern district of Florida, do hereby certify that the mandate of the circuit court of appeals for the fifth circuit of the United States, sent down to the above-entitled court, in the above-entitled cause, vacating the decrees of the above-entitled court, rendered August 4th and 5th, 1892, was received by me at my office and filed by me in the above cause on February 1st, 1893, at ten o'clock a. m.

Seal U. S. Circuit Court, Northern Dist. of Florida.

Witness my hand and the seal of this court, at the city of Jacksonville, in the district and circuit aforesaid, this 3rd day of February, A. D. 1893, and of our Independence the 117th year.

PHILIP WALTER, *Clerk.*

2 United States Circuit Court of Appeals, Fifth Circuit.

JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY.
vs.
AMERICAN CONSTRUCTION COMPANY.

No. 77. Costs.

Docketing cause and filing record	5 00	
2 appearances	50	
Filing 30 papers	7 50	
Filing briefs for appellant	5 00	
Filing briefs for appellee	5 00	
Entering 1 orders	20	
Entering submission	20	
Entering judgment	1 00	
Mandate	5 00	
		29 40
Attorneys' docket fee—Cooper & Cooper & others	20 00	
Cost of printing record	160 70	
		180 70
		$210 10

Taxed by—
J. W. McKEE, *Clk.*

1—14

3 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the hon orable the judges of the circuit court of the United State for the northern district of Florida, Greeting:

Whereas lately, in the circuit court of the United States for th northern district of Florida, before you or some of you, in a cau between The American Construction Company, complainant, an The Jacksonville, Tampa and Key West Railway Company, re spondent, a certain decree and order was rendered on the 4th day o August, 1892, as follows, to wit:

Circuit Court of the United States, Northern District of Florida.

AMERICAN CONSTRUCTION COMPANY *vs.* JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY *et al.* } In Equity

This cause came on to be heard on the 28th day of July, 1892, o a motion for the appointment of a receiver, upon the bill and affi davits and exhibits in support thereof, and affidavit of Charles C Deming on behalf of defendant company, and was argued by coun sel. On consideration thereof, it is ordered, adjudged, and decree that the said motion be, and the same is hereby, granted as fol lows:

1st. That Mason Young, Esq., is hereby appointed receiver of al the property, equitable interests, things in action, effects, moneys receipts, earnings, rights, privileges, franchises, immunities of th said defendant railway company mentioned and described in th said bill of complaint, wheresoever the same or any part thereo may be situated, with all the powers, rights, privileges, and duties o receivers in like cases and with the powers, rights, and duties a herein set forth.

2d. The said receiver shall forthwith enter upon and take pos session of all and singular the said properties, interests, things in action, effects, moneys, receipts and earnings, rights, privileges, fran chises, and immunities, and have, hold, use, operate, and exercis the same, and to hold, operate, and manage the railroads of the said defendant company, with its appurtenances, until the further orde of this court.

4 The said receiver is hereby ordered to enter upon and take possession of all and singular the railroad described in the bil of complaint as lately the property of the Florida Southern Railway Company, and recently, as appears from the said bill, sold and pur chased by the said defendant company, The Jacksonville, Tampa and Key West Railway Company, and all of the rights, privileges franchises, immunities, receipts, and earnings belonging or apper taining thereto until the further order of this court.

And it is further ordered that the said defendant railway com pany, its officers and agents, and all persons who may have posses

sion of any of the said railroad properties or appurtenances or rights and privileges thereof, deliver over to the said receiver all and every part of the properties, interest, effects, moneys, receipts, and earnings, and all the books, vouchers, and papers touching the operation of the said railroads or either of them, and all books of account and vouchers touching or relating to the moneys, finances, and assets of the said defendant company, including the stock books and stock ledgers of the said defendant company.

3d. It is further ordered that the said receiver as aforesaid be, and is hereby, authorized and empowered to defend and continue all suits brought by or against the said Jacksonville, Tampa and Key West Railway Company, whether before or after the appointment of the said receiver and whether in the name of the said company or otherwise, to defend all suits brought against him as such receiver or affecting his receivership, and is hereby authorized and empowered to bring all such suits in the name of the said company or in the name of the said receiver as he may be advised by counsel to be necessary and proper in discharge of the duties of his office, and for acquiring, securing, and protecting the assets, legal and equitable, the franchises and all the rights of the said company and of the said receiver, and for securing and protecting all the lands, land grants, and land reservations of the said company, it being the intention of this order to authorize, empower, and require the said receiver to proceed to collect all the accounts, claims, and demands of every nature and kind now due or which may afterwards accrue due to the said Jacksonville, Tampa and Key West Railway Company, and for the purposes of his receivership he is hereby authorized to employ counsel and to pay them reasonable compensation, such compensation, however, to be subject to the approval of the court in final settlement of the receiver's accounts.

4th. It is hereby ordered, adjudged, and decreed that the said Jacksonville, Tampa and Key West Railway Company and all its officers, agents, servants, and all persons whomsoever who may be in the possession of the properties of the Jacksonville, Tampa and Key West Railway Company, including the railroad properties and its appurtenances lately owned by the Florida Southern Railway Company, be, and they are hereby, enjoined from interfering with the possession, control, management, and operation of the said properties herein mentioned, and from in any way obstructing the exercise of any of the rights, powers, and privileges herein conferred upon the said receiver or the performance of any of the duties hereby imposed upon him. It is ordered that the restraining order made and filed on the 6th day of July, 1892, in this cause be continued until the further order of this court.

5th. It is hereby ordered that out of the moneys and income and revenues coming into his hands from the said properties or other assets of the said Jacksonville, Tampa and Key West Railway Company the said receiver pay all taxes legally imposed upon the said properties by State and municipal authorities, and is hereby author-

ized to pay for such repairs, supplies, material, labor, services
6 as shall in his judgment be necessary or proper to conserve and operate the said railroads and other properties aforesaid.

And he, the said receiver, is hereby also authorized to pay all indebtedness of the said railroad company heretofore incurred for expenses of operation, including repairs, supplies, material, labor, and services, which indebtedness has been incurred within the period of six months next preceding the date of this order.

6th. The said receiver shall cause to be kept just, full, and true accounts of his receipts and disbursements, and shall report his doings to this court with such accounts from time to time, and the said receiver may apply to this court for instructions and for such further orders in respect to his actions as such receiver as may from time to time be necessary or advisable.

And said receiver shall make and file in this court as early as practicable a schedule or inventory of all the properties and assets of the said defendant company.

7th. The said receiver shall take oath to faithfully perform his duties, and with one or more sureties shall execute to the clerk of this court, for the benefit of all concerned, a bond, to be approved by the judge of this court, in the sum of fifty thousand dollars, conditioned for the faithful performance of his duties hereunder, and that he will in all respects obey the orders of this court as such receiver.

CHAS. SWAYNE,
U. S. Judge.

Done this 4th day of August, 1892.

7 And whereas a certain other decree or order was in the said court and cause rendered on the 5th day of August, 1892, as follows, to wit:

In the United States Circuit Court, Fifth Judicial Circuit, Northern District of Florida.

AMERICAN CONSTRUCTION COMPANY
vs.
JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY *et al.*

The petition of Mason Young, receiver, for leave and authority to pay the semi-annual interest on the collateral trust bonds of the Jacksonville, Tampa and Key West Railway Company, now past due, the semi-annual interest on the St. John's and Lake Eustis Railway Company, the Atlantic Coast, St. John's and Indian River Railway Company, and Sanford and Lake Eustis Railroad Company, and sundry equipment notes, and for authority to renew other outstanding notes or obligations, coming on to be heard this day, and it appearing that the complainant, the defendant, and the receiver were present, by their respective counsel, and the court having considered of said petition—

It is ordered that the said Mason Young, receiver, do have the leave and authority of this court to pay such sums upon the said

interest and said obligations as he may find to be due and payable by the said Jacksonville, Tampa and Key West Railway Company, and to make renewals of obligations of said company as the same respectively fall due, said interest and obligations to be paid
8 out of the incomes of the said railways in his hands or from any moneys that may come into his hands as said receiver, and that if said income or said moneys shall not be sufficient to pay the said interest and obligations that he may issue his receiver's notes in payment of the interest and obligations of the company or, in his discretion, borrow money on such receiver's notes in order to pay such interest and obligations. The amount of said notes, however, outstanding at any one time shall not exceed one hundred and twenty-five thousand ($125,000) dollars.

Done this 5th day of August, 1892, in open court.

CHAS. SWAYNE,
U. S. Judge.

9 As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fifth circuit by virtue of an appeal sued out by the Jacksonville, Tampa and Key West Railway Company, agreeably to the act of Congress in such case made and provided, fully and at large appears; and whereas on the 18th day of November, 1892, the appellee filed in the United States circuit court of appeals for the fifth circuit a motion to dismiss the appeal in said cause;

And whereas in the present term of November, in the year of our Lord one thousand eight hundred and ninety-two, the said cause came on to be heard before the said United States circuit court of appeals on said motion and on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the motion to dismiss the appeal be, and the same is, overruled, and that the orders appealed from be, and the same are hereby, reversed and set aside except as to the injunction modified as herein set forth, and the circuit court for the northern district of Florida is instructed to modify the restraining order, made and filed on the 6th day of July, 1892, and continued by the order of August 4, 1892, and which restrains the said defendant railway company, its officers, agents, attorneys, servants, and employees, from remitting, sending, or removing in any manner whatsoever any of the income, tolls, and revenues of the said defendant company from the jurisdiction of this court, either to its treasurer in New York or to any other officer or person whatsoever, so as to permit the sending of money for the payment of the interest on Jacksonville, Tampa and Key West railway bonds which have been regularly sold, and for the purchase of necessary equipment and supplies, and be further so modified as to restrain the said defendant railway company, its officers, agents, attorneys, and servants, from selling and disposing of, hypothecating, or pledging any of the bonds of the issue known as the four million six per cent. consolidated

bonds at less than par value in regard only to those bonds which still continue and remain the property of said company, and the said court is further instructed to vacate the order of August 4, 1892, appointing a receiver, discharge the receiver, and restore the property of said defendant company to the officers thereof.

It is further ordered and adjudged that the appellee, The American Construction Company, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court, amounting to the sum of two hundred and ten dollars and ten cents.

You therefore are hereby commanded that such further proceedings be had in said cause in accordance with the decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 30 day of January, in the year of our Lord one thousand eight hundred and ninety-three.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed: United States circuit court of appeals for the fifth circuit. No. 77. November term, 1892. The Jacksonville, Tampa and Key West Railway Company *vs.* The American Construction Company. Mandate. Filed Feb. 1, 1893. Philip Walter, clerk.

I, Philip Walter, clerk of the United States circuit court, 5th judicial circuit, northern district of Florida, do hereby certify that the foregoing is a true and correct copy of the original mandate from the files of my office.

Seal U. S. Circuit Court, Northern Dist. of Florida.

Witness my hand and the seal of this court, at the city of Jacksonville, in the district and circuit aforesaid, this 16th day of February, A. D. 1893, and of our Independence the 117th year.

PHILIP WALTER, *Clerk.*

Supreme Court of the United States.

OCTOBER TERM, 1892.

EX PARTE: IN THE MATTER OF THE AMERICAN CONSTRUCTION COMPANY,

PETITIONER.

Petition for a Writ of Mandamus or for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

WILLIAM B. HORNBLOWER,
WILLIAM PENNINGTON,
Of Counsel for Petitioner.

bonds at less than par value in regard only to those bonds which still continue and remain the property of said company, and the said court is further instructed to vacate the order of August 4, 1892, appointing a receiver, discharge the receiver, and restore the property of said defendant company to the officers thereof.

It is further ordered and adjudged that the appellee, The American Construction Company, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court, amounting to the sum of two hundred and ten dollars and ten cents.

You therefore are hereby commanded that such further proceedings be had in said cause in accordance with the decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 30 day of January, in the year of our Lord one thousand eight hundred and ninety-three.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed: United States circuit court of appeals for the fifth circuit. No. 77. November term, 1892. The Jacksonville, Tampa and Key West Railway Company *vs.* The American Construction Company. Mandate. Filed Feb. 1, 1893. Philip Walter, clerk.

I, Philip Walter, clerk of the United States circuit court, 5th judicial circuit, northern district of Florida, do hereby certify that the foregoing is a true and correct copy of the original mandate from the files of my office.

Seal U. S. Circuit Court, Northern Dist. of Florida.

Witness my hand and the seal of this court, at the city of Jacksonville, in the district and circuit aforesaid, this 16th day of February, A. D. 1893, and of our Independence the 117th year.

PHILIP WALTER, *Clerk.*

Supreme Court of the United States.

OCTOBER TERM, 1892.

EX PARTE: IN THE MATTER OF THE AMERICAN CONSTRUCTION COMPANY,

PETITIONER.

Petition for a Writ of Mandamus or for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

WILLIAM B. HORNBLOWER,
WILLIAM PENNINGTON,
Of Counsel for Petitioner.

THE AMERICAN CONSTRUCTION COMPANY

against

THE JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY ET AL.

To the Honorable the Justices of the Supreme Court of the United States of America:

Your petitioner, The American Construction Company, respectfully shows unto your honors as follows:

That your petitioner is a citizen of the State of Illinois, being a corporation created by and existing under the laws of said State, having its principal office in the city of Chicago, in said State.

That on or about the sixth day of July, eighteen hundred and ninety-two, your petitioner filed a bill in the circuit court of the United States for the northern district of Florida, to which bill were made defendants The Jacksonville, Tampa and Key West Railway Company, a corporation created by and existing under the laws of the State of Florida, and then engaged in operating a railroad in and through said State; and also The Florida Construction Company, a corporation created by and existing under the laws of the State of New Jersey; and also The Florida Commercial Company, a corporation created by and existing under the laws of the said State of Florida; and also Robert H. Coleman, of the State of Pennsylvania; Charles C. Deming, Archibald Rogers, both of the State of New York, and Frank Q. Brown and John W. Candler, both of the State of Massachusetts.

That subsequently, by orders of the said circuit court, the said bill of complaint was dismissed as to the said defendants The Florida Construction Company and Charles C.

Deming on the ground that they were not residents of said district.

That the said bill was filed as aforesaid, among other things, for the purpose of securing an accounting by and with the said The Jacksonville, Tampa and Key West Railway Company and an appointment of a receiver of the property and assets of said company and the issuing of an injunction restraining the said railway company, its officers and agents, as hereinafter more particularly set forth, and that said bill had attached thereto various affidavits bearing upon the matter of the appointment of such receiver and issuing of such injunction.

That upon the filing of said bill and affidavits, to wit, on the sixth day of July, 1892, your petitioner, the complainant in said bill, by its solicitors, made a motion before said circuit court for writs of injunction against the said defendants, and also for an order appointing a receiver of the moneys, tolls, incomes, railroads, properties of every nature and kind of said company, and that the hearing of said motion was from time to time postponed by said court, at the instance of the said defendant railway company, until the twenty-eighth day of July, 1892, on which last-mentioned day the said motion was argued before said court upon the said bill and affidavits and upon the affidavits and statements of reasons filed by the said defendant railway company in said cause; and the said circuit court, having duly heard and considered the arguments of the respective counsel for your petitioner and the said The Jacksonville, Tampa and Key West Railway Company, afterwards, to wit, on the fourth day of August, 1892, made an order and decree in the said cause, the same being interlocutory only, the said cause having not reached a final hearing and no final decree having been made therein, in and by which order and decree it was, among other things, ordered, adjudged, and decreed that Mason Young, Esq., should be, and he was thereby, appointed receiver of all the property of said railway com-

pany; and further ordered, adjudged, and decreed that the said The Jacksonville, Tampa and Key West Railway Company should be, and they were thereby, enjoined from interfering with the possession of said property and from obstructing the exercise of any of the rights, powers, and privileges conferred by said order upon said receiver or the performance of the duties by order imposed upon said receiver, as in and by the said interlocutory order, a copy of which is annexed hereto, making part hereof, will more fully and at large appear.

That after the making of the said interlocutory order the said Mason Young duly qualified as receiver in accordance with the terms of said order and took possession of the property and assets of said railway company, and that he has continuously since that time remained and now remains in the full possession and control of the said railway property, and has operated and is now operating the same.

That on the 6th day of August, 1892, the said receiver applied, by his petition to the said circuit court of the United States for the northern district of Florida, for leave to borrow money for the purposes of the railroad; whereupon and upon the 5th day of August, 1892, the said circuit court made an order, which was filed on the 6th day of August, 1892, directing the said receiver to pay interest upon certain obligations of the railroad company and to borrow money upon receiver's notes for that purpose, not to exceed the sum of $125,000, of which order a copy is annexed hereto, making part hereof.

That on or about the twenty-seventh day of August, eighteen hundred and ninety-two, the said defendant railway company filed its appeal to the United States circuit court of appeals for the fifth circuit from the whole of said orders and decrees, and that on the twenty-seventh day of August, eighteen hundred and ninety-two, the said appeal was allowed.

That your petitioner, by its solicitors, on or about the

eighteenth day of November, eighteen hundred and ninety-two, made a motion in the said the United States circuit court of appeals to dismiss the appeal on the ground, among other reasons, that the said court had no jurisdiction to review the action of the court below in granting the said orders appealed from or either of them.

That the said circuit court of appeals, notwithstanding the said motion to dismiss said appeal, entertained and heard said appeal, and having heard and considered the arguments of respective counsel of the parties, both upon the question of the jurisdiction of said circuit court of appeals to review the action of said circuit court in appointing said receiver and upon all the other questions presented for review by said appeal, afterwards, to wit, on the sixteenth day of January, eighteen hundred and ninety-three, made a final order and decree that the said motion to dismiss the appeal should be overruled, and that the orders appealed from should be reversed and set aside except as to the injunction and restraining order that they should be modified in the particulars set forth more particularly in the said decree of said circuit court of appeals, a copy of which is hereto annexed.

Your petitioner respectfully submits to your honors that the action above described of the said circuit court of appeals in reviewing so much of the said order of the said the United States circuit court for the northern district of Florida as appointed a receiver as aforesaid and of the said order of said circuit court upon the petition of said receiver for leave to borrow money was wholly beyond the jurisdiction of said circuit court of appeals.

Your petitioner therefore prays that a writ of mandamus may issue, commanding and instructing the said circuit court of appeals to dismiss so much of said appeal of said defendant railway company as undertook to bring up for review before said circuit court of appeals the action of said circuit court of the United States for the northern district

of Florida in appointing said receiver and in authorizing said receiver to borrow money upon receiver's notes as aforesaid, or that a writ of certiorari may issue to said circuit court of appeals to bring up for review before your honors the said order and decree of said circuit court of appeals, and that your petitioner may have such further and other relief in the premises as law and justice may require.

THE AMERICAN CONSTRUCTION CO.,
By JAMES H. YOUNG, *President.*

STATE OF NEW YORK,
City and County of New York, } ss:

James H. Young, being by me duly sworn according to law, on his oath says:

I am the president of the petitioner, The American Construction Company. The facts, matters, and things set forth in this petition, so far as they relate to my own acts, are true; so far as they relate to the acts of others I believe them to be true.

JAMES H. YOUNG.

Sworn and subscribed to before me this 31st day of January, 1893.

[SEAL.] JOHN DAVIS,
Notary Public (150), *N. Y. Co.*

[Endorsed:] Supreme Court of the U. S. American Construction Company against The Jacksonville, Tampa and Key West Railway Company. Petition and affidavit. Hornblower, Byrne & Taylor, attorneys for petitioner, 45 William street, New York.

YOUNG *et al.*

vs.

THE FLORIDA CONSTRUCTION COMPANY *et al.*

Statement.

This is an appeal by the Florida Construction Company from an order of the circuit court entered August 2, 1892, whereby a receiver was appointed of all the property of the Construction Company within the jurisdiction of the court with power to reduce the assets of the company to his possession and to hold the same during the pendency of the action, subject to the further order or decree of the court. The order provided that the officers and agents of the Construction Company should forthwith deliver up to the receiver all and every part of the property of the company and all books, accounts, vouchers, and papers in any way relating to its business. The order also provided that the Construction Company, its officers and agents, be enjoined and restrained from removing from the jurisdiction of the court any of the books, papers, or property of the company and from disposing of any of the assets or property of the company and from interfering in any way in the possession or control of the receiver over the same.

WALLACE, *C. J.:*

The appellant insists that a sufficient case was not made in the court below for the appointment of a receiver by the bill of complaint and the depositions used upon the motion, and, this being so, that the injunction should not have been granted by the circuit court. We are of the opinion that we are not at liberty upon the present appeal to inquire

whether the circuit court erred in appointing a receiver, but are confined to the question whether, there being a proper case for the receivership, the injunction was not a necessary or proper auxiliary remedy.

This court cannot review the action of the circuit court in appointing a receiver except upon an appeal from a final decree. Our appellate jurisdiction is confined to the review of final decisions by appeal or writ of error (section 6, Court of Appeals Act), except where, by section 7, an appeal may be taken in equity causes from an interlocutory order or decree granting or continuing an injunction. The order appointing a receiver is not appealable, because it is not a final decision (Forgay *vs.* Conrad, 6 How., 201; Grant *vs.* Phœnix Insurance Company, 106 U. S., 439). We ought not to attempt to review indirectly an order or decision which we are not permitted to review directly; and if this court should conclude that an injunction should not have been ordered because there was not a sufficient case for the appointment of a receiver, our mandate could not direct the circuit court to vacate the receivership. It would have been entirely competent for the circuit court to embody its decision in two orders, one appointing a receiver and the other granting the injunction, and if it had done this the latter only would have been subject to review. We cannot with propriety or consistency undertake to review the other merely because both have been assembled together. Congress might have authorized an appeal from an interlocutory order or appeal appointing a receiver, but it has not done so. The language of the section permits a review of the order or degree granting or continuing an injunction so far as may be necessary to do justice in the particular case. Whenever the injunction is the main relief granted the whole case is necessarily presented for review. When it is a substantial part of the relief granted it may be necessary to consider the whole case on appeal; but when, as in the present case, it is incidental and subsidiary merely to other relief, an appeal only brings

up for determination the question whether, conceding the other relief to have been proper, the injunction was a necessary or proper auxiliary remedy. For these reasons the question whether or not a receiver ought to have been appointed in the present case should not be entertained, and we are only to decide whether the court erred in allowing an injunction also.

The injunction allowed by the interlocutory order is merely subsidiary to that part of the order whereby a receiver is appointed of the property and effects of the Construction Company, the appellant, *pendente lite.* Although it is auxiliary to the receivership, it is a remedy so merely formal in the present case that it is difficult to conceive how it could have benefited the complainants or injured the appellant. The order constituting the receivership among other things directed the officers and agents of the Construction Company to forthwith deliver to the receiver all the property of the company in their possession, and for a refusal to comply they would be punishable by process of contempt as effectually as they could be under the injunction if in violation of its terms they should remove the property beyond the jurisdiction of the court.

The appointment of a receiver is a remedy somewhat more stringent than an injunction restraining the party whose property is subjected to a receivership from removing it beyond the jurisdiction of the court (Cin., Sandusky & Cleveland Railroad Co. *vs.* Sloan, 31 Ohio St., 1.) In the case of Skip *vs.* Harwood, 3 Atk., 564, where the defendant was present in court during the hearing on a bill for an accounting, and in consequence knew of the decision appointing a receiver, he was adjudged to be in contempt for removing a portion of the assets before the decree was drawn. The injunction in the present case may have been unnecessary, but it is hardly open to argument that if the case presented to the circuit court justified the appointment of a receiver it could not have been an improper exercise of discretion on

the part of the court to enjoin the officers and agents of the Construction Company from doing any acts which might tend to render the receivership ineffectual.

The order should therefore be affirmed.

(Endorsed:) Young *vs.* Florida Construction Co. Opinion. United States circuit court of appeals, second circuit. Filed Dec. 12, 1892. John A. Shields, clerk.

A copy.
[SEAL.] JOHN A. SHIELDS, *Clerk.*

[Endorsed:] U. S. circuit court of appeals, second circuit. Young *et al. vs.* The Florida Construction Co. *et al.* Copy opinion, Wallace, J. Original filed Dec. 12, 1892.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

IN THE

Supreme Court of the United States.

EX PARTE: IN THE MATTER

OF

THE AMERICAN CONSTRUCTION COMPANY,
Petitioner.

Nos. 14 and 15 Original.

AMERICAN CONSTRUCTION COMPANY

AGAINST

JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY and others.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND FOR GRANTING ANNUITIES

AGAINST

THE JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY and others.

GENTLEMEN—In accordance with the order of this Court, made on the second day of February, 1893, we hereby give you notice that we shall move the Court on the sixth day of March, 1893, for the relief prayed for

in the petitions filed herein, copies of which are herewith served upon you, namely: That a writ of *mandamus* be issued to the United States Circuit Court of Appeals for the Fifth Circuit, or that a writ of *certiorari* be issued to said Circuit Court of Appeals, as prayed for in said petitions; or in the alternative we shall move that a writ of *mandamus* be issued directed to the Circuit Court of the United States for the Northern District of Florida, commanding and directing that Court to disregard the mandates of the United States Circuit Court of Appeals for the Fifth Circuit, in the suits above entitled, except so far as said mandates affirm, modify or reverse the injunction orders of the said Court, and especially to disregard those portions of said mandates that undertake to modify or reverse any order appointing or refusing to appoint a Receiver; or, in the alternative, we shall move the Court for such other and further relief as to the Court may seem just.

Dated New York, February 7th, 1893.

(Sgd.) WM. PENNINGTON,
(Sgd.) WM. B. HORNBLOWER,
Of Counsel for Petitioner.

To MESSRS. SIMPSON, THACHER & BARNUM
And MESSRS. COOPER & COOPER,
Solicitors for Jacksonville, Tampa and Key West Railway Company and others.

[ENDORSED:]

Supreme Court of the U. S. *Ex parte In re* Am. Constr. Co., Petitioner. Original 14 & 15. Am. Constr. Co. vs. Jacksonville, Tampa & Key West Ry. Co. *et al.* The Penna. Co. for Ins. on Lives & for Granting Annuities vs. The Jacksonville, Tampa & Key West Ry. Co. *et al.* Copy. Notice of motion for mandate. Wm. B. Hornblower, Wm. Pennington, of Counsel for Petitioner.

IN THE

Supreme Court of the United States.

AMERICAN CONSTRUCTION COMPANY AGAINST JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY and others.	Oct. Term, 1892. No. 14. Original.
Ex parte AMERICAN CONSTRUCTION COMPANY.	

BRIEF ON BEHALF OF PETITIONER.

Statement.

This is an original application for a writ of *certiorari* to review a decision of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, or, in the alternative, for a writ of *mandamus* to the same Court to direct that Court to dismiss so much of the appeal of the defendant as undertook to bring up for review the action of the Circuit Court of the United States for the Northern District of Florida in appointing a Receiver of the Jacksonville, Tampa and Key West Railway Company and authorizing the Receiver to borrow money on Receiver's notes.

We also pray in our petition for such further and other relief in the premises as law and justice may require and we have served a notice that we shall move this Court, by way of a further alternative, for a writ of *mandamus* to the United States Circuit Court for the Northern District of Florida to disregard the mandate of the Circuit Court of Appeals, or so much thereof as undertakes to vacate the receivership (see our notice of motion).

The copy of the record filed with the petition shows that the petitioner, an Illinois corporation, as a stockholder of the Jacksonville, Tampa and Key West Railway Company, a Florida corporation, filed its bill in the Circuit Court of the United States for the Northern District of Florida on the 6th day of July, 1892, on behalf of itself and such other stockholders as might come in, and moved for the appointment of a Receiver of the property and effects of the railway company to hold the same *pendente lite.*

Notice of the application was duly given to the defendant railway company, and after full argument and after reading voluminous affidavits on both sides, the Court, by an order made on the 4th of August, 1892 (see pp. 79 to 81 of the Record), appointed Mason Young, Esq., Receiver to hold the property of the company pending the suit.

Concurrently with the appointment of a Receiver, the Court granted an injunction in aid of the receivership, restraining the corporation and its officers, etc., from interfering with the property of the railroad, or with the custody of the Receiver, and from disposing of any of the bonds of the railway company.

On the 5th of August, 1892, an order was made authorizing the issue of Receiver's notes to the amount of $125,000 to pay certain accruing interest and obligations (p. 85).

From these orders an appeal was taken by the defendant railway company to the United States Circuit Court of Appeals for the Fifth Judicial Circuit. The

complainant, the appellee in that Court, moved to dismiss the appeal so far as concerned the receivership, for want of jurisdiction. This motion was denied by the Court of Appeals, and they proceeded to review and reverse the orders so far as the receivership was concerned, and vacated the receivership, but modified the injunction instead of reversing it *in toto*. No opinion was delivered by the Court of Appeals. An application for rehearing was made to the Circuit Court of Appeals and the rehearing was refused. Thereupon the mandate of the Court was sent down to the Circuit Court for the Northern District of Florida, but before it was carried into effect this petition was presented to this Court, and leave was obtained to file the same, and this Court granted a stay of further proceedings under the mandate until the matter could be heard, with leave to the defendant to move to vacate the stay, upon telegraphic notice, on or before the 6th day of February, 1893. Notice of such a motion was given but withdrawn.

We claim that the United States Circuit Court of Appeals had no jurisdiction under the statute to entertain the appeal from the order appointing the Receiver or from the order authorizing the issuing of Receiver's notes; that, if they had jurisdiction at all, it was only for the purpose of reviewing the injunction, and they had no right to reverse or vacate that portion of the order of August 4th which appointed the Receiver, nor to reverse the order of August 5th as to Receiver's notes.

We claim further, that this Court can review the decision of the Circuit Court of Appeals by *certiorari*, and in view of the conflict of decisions between the Circuit Court of Appeals for the Fifth Circuit and the Circuit Court of Appeals for the Second Circuit on this question, a proper case is presented for the granting of a writ of *certiorari* under the statute of March 3, 1891. Or, if the Court is of opinion that a proper case is not

presented for *certiorari*, within the provisions of that statute, then we claim that a writ of *mandamus* should issue to command the Circuit Court of Appeals to revoke its mandate and to dismiss the appeal, or so much thereof as relates to the receivership, for want of jurisdiction, or that a writ of *mandamus* should issue to the Circuit Court for the Northern District of Florida directing that Court to disregard so much of said mandate as vacates the receivership.

POINTS.

I.

The United States Circuit Court of Appeals has no jurisdiction to entertain an appeal from an interlocutory order appointing a Receiver pendente lite.

The only authority for an appeal from an interlocutory order is Sec. 7 of the Act of March 3, 1891, which reads as follows:

"SEC. 7. That where, upon a hearing in equity in a "District Court or in an existing Circuit Court, an in- "junction shall be granted or continued by an inter- "locutory order or decree in a cause in which an "appeal from a final decree may be taken under the "provisions of this act to the Circuit Court of Appeals, "an appeal may be taken from such interlocutory "order or decree granting or continuing such injunc- "tion to the Circuit Court of Appeals."

(a) If, therefore, the United States Circuit Court had simply granted the motion for a Receiver *pendente lite* and had appointed a Receiver without granting an

injunction, no appeal whatever could have been taken from the order. We presume this will not be disputed. Certainly the right of appeal from an interlocutory order will not be spelled into the statute by implication, this being a new departure in the practice of the Federal courts from the time of the original judiciary act of 1789, the settled practice having been, prior to the act of 1891, that no appeal whatever could be taken except from a final judgment or decree.

The learned and astute lawyers composing the judiciary committees of the two Houses of Congress who passed upon and approved the Act of 1891, and the very eminent statesman and jurist whose name it commonly bears, Mr. Evarts, were certainly not ignorant of the facts that United States Circuit Courts are appointing Receivers *pendente lite* every day; that this is one of their most frequent judicial acts; that railway mortgages are being foreclosed all over the United States in the Federal Courts, and that Receivers of railroads to run and operate the same during the pendency of such suits are appointed daily. Knowing these facts, it is certainly a little remarkable if they have by implication given the right of review to the Circuit Court of Appeals from an order appointing a Receiver, without expressly naming such orders. Indeed it cannot be plausibly argued either that the Congress which passed this bill did not consider the question, nor that having considered it they intended to give an appellate jurisdiction by indirection and implication over this important class of orders.

On the contrary, the omission to mention orders appointing receivers is conclusive evidence that Congress did not intend that such orders should be reviewed by appeal. The main class of cases intended to be covered by this section 7 was undoubtedly patent cases, where interlocutory orders and decrees granting injunctions often work great hardship to the defendant, and where, prior to this statute, no appeal

could be taken until after a final decree, and such final decree could be had only after a long accounting.

(b) If we are right in our view that a simple order appointing a Receiver would not be appealable, then we claim further that the tacking on to the receivership order of an injunction does not make the order appealable. An injunction order is a matter of course in every receivership. It is merely in aid of the appointment of the Receiver. If the Receiver be properly appointed, then the injunction is properly granted. If the Receiver be not properly appointed, then the injunction is not properly granted. There is no question, therefore, raised by the appeal from the injunction, except the propriety of the receivership, unless it be the question whether the injunction is too broad in its terms, or for some special reason is inequitable or unjust.

Is there any doubt that upon the argument of the appeal we might have waived the portion of the order granting the injunction, and might have consented to its reversal? And if we had consented to a reversal and a vacating of the injunction, could the Court have then proceeded to review the remaining portion of the order appointing the Receiver? And if we could have thus taken away the jurisdiction of the Circuit Court of Appeals to review the receivership portion of the order by consenting to vacate the injunction, can the Court go further and grant further relief to the appellant against our consent and without our consent than it could have granted with our consent?

Again, the injunction in aid of the receivership might have been granted by an entirely separate order. We might, in such case, have taken an order appointing a Receiver, from which no appeal could have been taken. We might, the next day, the following week or two months thereafter, have applied for and obtained an injunction in aid of the receivership. Would this justify an appeal from the order appointing the Receiver even after the time to appeal had gone by? Or would

the appeal from the separate injunction order authorize the Court to review and vacate the previous order granting the receivership? The mere fact that the receivership and the injunction are contained in the same order of the Court made on the same day can certainly give no greater jurisdiction to the Circuit Court of Appeals than that Court would have had in case the orders had been made as they might have been made—separately.

(c) The precise question involved here has been decided by the Circuit Court of Appeals for the Second Judicial Circuit in the case of *Young vs. The Florida Construction Company*, the opinion being delivered by Circuit Judge WALLACE and concurred in by Judge WHEELER (not yet reported, but submitted herewith to the Court in connection with our petition in printed form). In the opinion the Court said:

"We are of the opinion that we are not at liberty "upon the present appeal to inquire whether the "Circuit Court erred in appointing a Receiver, but "are confined to the question whether, there "being a proper case for the receivership, "the injunction was not a necessary or proper "auxiliary remedy. * * * The order appointing "a receiver is not appealable, because it is not a "final decision (Forgay vs. Conrad, 6 How., 201; "Grant vs. Phœnix Insurance Co., 106 U. S., 439). "We ought not to attempt to review indirectly an "order or decision which we are not permitted to re-"view directly; and if this Court should conclude that "an injunction should not have been ordered, because "there was not a sufficient case for the appointment of "a Receiver, our mandate could not direct the Circuit "Court to vacate the receivership. It would have "been entirely competent for the Circuit Court to em-"body its decision in two orders, one appointing a Re-"ceiver, and the other granting an injunction; and if "it had done this, the latter only would have been sub-

" ject to review. We cannot, with propriety or con-
" sistency, undertake to review the other merely be-
" cause both have been assembled together. Congress
" might have authorized an appeal from an interlocu-
" tory order or decree appointing a Receiver, but it has
" not done so."

(d) The decisions in other Circuits are not in conflict with the decision of the Court of Appeals in the Second Circuit on this subject, except the decision of the Fifth Circuit in the case now sought to be reviewed. The case of *Richmond vs. Atwood*, in the Circuit Court of Appeals for the First Circuit, 52 Federal Reporter, 10, was an appeal from an interlocutory decree in a patent cause. This decree had granted a perpetual injunction and accounting, and it was held, that on such an appeal, where the whole record is before the Circuit Court of Appeals, that Court, in order to determine the rightfulness of the injunction, must necessarily examine the whole case on the merits, and if it reaches the conclusion that there is no infringement, it may not only reverse the decree and dissolve the injunction, but may also vacate the order for an accounting and order the appeal dismissed, thus rendering such a decree as the lower Court should have rendered on the hearing at which the injunction was granted.

A previous case in the Fifth Circuit, *Jones Co. vs. Munger Co.*, 50 Federal Reporter, 785, presented the same situation.

These decisions, however, are not authorities for the position taken by the Circuit Court of Appeals in this case. It is perfectly manifest that there is no way of reviewing an injunction order or decree in a patent suit unless the Court reviews the merits of the patent and the merits of the suit, and in thus reviewing the merits of the suit they necessarily put themselves in the position of the Circuit Court and it might be that in such case they could give the same

relief for or against the complainant that the Circuit Court should have given on the hearing at which the injunction order or decree was granted. The distinction between that case and the case of a receivership *pendente lite* is clearly pointed out by his Honor JUDGE WALLACE, in his opinion in the case of *Young vs. The Florida Construction Company*, as follows:

"Whenever the injunction is the main relief granted, "the whole case is necessarily presented for review. "When it is a substantial part of the relief granted, it "may be necessary to consider the whole case on ap- "peal. But when, as in the present case, it is inci- "dental and subsidiary merely to other relief, an appeal "only brings up for determination the question whether, "conceding the other relief to have been proper, the "injunction was a necessary or proper auxiliary remedy. "For these reasons the question whether or not a Re- "ceiver ought to have been appointed in the present "case should not be entertained, and we are only to "decide whether the Court erred in allowing an injunc- "tion also. * * * The injunction in the present "case may have been unnecessary, but it is hardly open "to argument that, if the case presented to the Circuit "Court justified the appointment of a Receiver, it could "not have been an improper exercise of discretion "on the part of the Court to enjoin the officers and "agents of the construction company from doing any "acts which might tend to render the receivership in- "effectual."

It has furthermore been held by the Circuit Court of Appeals for the Sixth Circuit, in the case of the *Columbus Watch Company vs. Robbins*, 52 Fed. Rep., 337, Circuit Judge JACKSON delivering the opinion of the Court, that even in a patent case and upon appeal from a decree sustaining the validity of a patent, declaring infringement, directing an injunction perpetual in form, and referring the cause to a Master to take account of damages and profits, such a decree is not appealable in its entirety, so as

to give the Circuit Court of Appeals jurisdiction to finally determine the questions of validity and infringement, for the decree is not final in its nature, and appealable as such under prior laws, but is interlocutory, and on appeal therefrom, under Section 7 of the Act creating the Circuit Court of Appeals, the Court is limited to the question whether the injunction was providently granted in the exercise of a legal discretion, and it can have no jurisdiction to render a decision on the other questions, even at the request of both parties. The Court disapproves of the case of *Jones Co. vs. Munger Co.*, above referred to. Judge JACKSON says:

"This application is rested upon the authority of "Richmond vs. Atwood, 48 Fed. Rep., 910; 1 C. C. A., "144 (decided by the Circuit Court of Appeals for the "First Circuit), and Jones Co. vs. Munger Manufg. Co., "50 Fed. Rep., 785, 1 C. C. A., 158 (decided by the "Circuit Court of Appeals for the Fifth Circuit). In "the latter case the Circuit Court of Appeals for the "Fifth Circuit expressed the opinion that an appeal "like the present, under the Seventh Section of the Act "of March 3, 1891, invested the appellate court with "such jurisdiction over the cause that, if the appellee "submitted to its being heard and decided upon "its merits, the Court had the authority to "consider and finally determine the entire controversy. "It will, however, be observed that the order in that "case remanding the cause to the Circuit Court, only "directed the injunction to be dissolved and discharged. "In Richmond vs. Atwood, the Court went into a consideration of the questions relating to the validity of "the patent and its infringement for the purpose of "ascertaining whether the injunction was properly or "improperly granted, and did not undertake to pronounce any judgment or decree upon the merits, as "this Court is requested to do in the present case. We "entertain no doubt as to the power and duty of this "Court, under the present appeal, to examine and

" consider the case presented by the record, for the " purpose of determining whether the order of the " lower Court, granting the injunction, was or was not " erroneous. But we find ourselves unable to concur " in the opinion expressed by the Court in Jones vs. " Munger Manufg. Co., that this Court can, by the " submission or consent of the parties, assume and " exercise jurisdiction over the subject matter of the " litigation not covered by the appeal allowed and " taken. * * * This Court, by virtue of that ap- " peal, has before it for determination only the question " whether that injunction should be sustained or dis- " solved. The cause is still pending in the Circuit " Court upon all other questions and matters " involved in the litigation. * * * If this " Court were now to pronounce a final decree " upon the matters or questions which still " remain subject to the jurisdiction and control of the " Circuit Court, it would be going beyond its legitimate " sphere of judicial authority. This Court, under the " law of its creation, possesses and can properly exer- " cise only an appellate jurisdiction. * * * The " Act of 1891, Section 7, permits an appeal from an " interlocutory order granting or continuing an in- " junction. The present appeal is allowed and taken " from such an order, and its legal effect and operation " is to remove from the trial Court to this Court only " that part of the decree which relates to the injunction. " That part of the interlocutory decree is before this " Court for review. The lower Court has no further " control or jurisdiction over that subject until it re- " ceives the mandate of this Court affirming or reversing " its order granting the injunction. But all other parts " or portions of the interlocutory decree, such as " those relating te the validity of the reissue patent and " its infringement, and the questions that may arise " upon the account ordered to ascertain damages and " profits, have not yet left the jurisdiction of the lower " Court. That Court may hereafter change its inter-

" locutory decree on the very questions this Court is " requested to decide finally. For aught that appears " or is known to this Court, the lower Court may have " already done so. But suppose this Court should de- " cide the merits of the case, its decision of matters or " questions not before it for review, under the present " appeal, would have no binding force on the lower " Court, and might be wholly disregarded when that " Court came to a final hearing of the cause."

The Court, however, while expressing its opinion thus decidedly on the question, nevertheless, in view of the contrary decision of the Fifth Judicial Circuit in the case of Jones Co. vs. Munger Manufg. Co., certified the question up to this Court. We understand this cause is on the docket of this Court, and is set down for argument for the 6th of March.

As indicating the strictness with which this section is to be construed, the decision of the Circuit Court of Appeals for the First Circuit in the case of the *Boston & A. R. R. vs. Pullman's Palace Car Co.*, 51 Fed. Rep., 305, is in point, where it was held that an appeal could not be taken from an order denying a petition for a dissolution of an injunction and a rehearing, on the ground that it was not an interlocutory decree or order "continuing" an injunction within the meaning of Section 7 of the act.

Our attention has not been called to any other decision under this section than those above referred to.

(e) Even if there might be jurisdiction in the Court of Appeals to review an order appointing a Receiver and granting an injunction in a case where there is absolutely no ground set forth in the bill for either the receivership or the injunction, or where the bill is absolutely without equity, or where the Court below has no jurisdiction to entertain the suit, which we by no means concede; yet this clearly is not such a case, nor is the order of the Circuit Court of Appeals based on any such theory. On the contrary, while assuming

jurisdiction by reason of the injunction, it does not reverse the injunction order but modifies it, and, as modified, sustains it. Having thus sustained the injunction, and thereby in effect held that the bill had merit and that the Court below had jurisdiction, it proceeds to reverse the order so far as it appointed a Receiver. The order, as set forth at page 128 of the Record, is as follows:

"On consideration whereof, it is now here ordered and adjudged by this Court that the motion to dismiss the appeal be, and the same is, overruled, and that the orders appealed from be, and the same are, hereby reversed and set aside, except as to the injunction modified as herein set forth; and the Circuit Court for the Northern District of Florida is instructed to modify the restraining order made and filed on the 6th day of July, 1892, and continued by the order of August 4, 1892, and which restrains the said defendant railway company, its officers, agents, attorneys, servants and employees from remitting, sending or removing, in any manner whatsoever, any of the income, tolls and revenues of the said defendant company rom the jurisdiction of this Court, either to its treasurer in New York or to any other officer or person whatsoever, so as to permit the sending of money for the payment of the interest on Jacksonville, Tampa and Key West Railway bonds which have been regularly sold, and for the purchase of necessary equipment and supplies, and be further so modified as to restrain the said defendant railway company, its officers, agents, attorneys and servants from selling and disposing of, hypothecating or pledging any of the bonds of the issue known as the four million six per cent. consolidated bonds at less than par value in regard only to those bonds which still continue and remain the property of said company; and the said Court is further instructed to vacate the order of August 4, 1892, appointing a Receiver, discharge the Receiver, and restore the property of said defendant company to the officers thereof."

II.

This Court has authority, under Section 6 of the Act of March 3, 1891, to issue its writ of certiorari to bring up this decision of the Circuit Court of Appeals for review.

That section, after providing that the decision of the Circuit Court of Appeals in certain cases shall be final, including "cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States," in which class of cases the present suit belongs, proceeds to make an exception, giving the right to the Circuit Court of Appeals to certify questions up to this Court; and then further proceeds: "And excepting also that, in any such case "as is hereinbefore made final in the Circuit Court of "Appeals, it shall be competent for the Supreme Court "to require by *certiorari* or otherwise any such case to "be certified to the Supreme Court for its review and "determination, with the same power and authority in "the case as if it had been carried by appeal or writ of "error to the Supreme Court."

This provision seems to give this Court plenary authority to review any decision of the Circuit Court of Appeals by *certiorari* in any case where the jurisdiction of the Circuit Court depends upon citizenship of the parties, and there seems to be no reason why this right of review by *certiorari* should be restricted to the reviewing of the decisions of the Circuit Court of Appeals on final judgments or decrees. The language is not in terms so restricted, nor does there seem to be any reason why it should be, especially as the prior clauses of the section appear to authorize the certification by the lower court of any question at any stage of the proceedings for instruction from the Supreme Court.

III.

This is a proper case for the granting of the writ.

The question involved is one of great importance to many litigants, and one which arises constantly in a large class of suits involving vast financial interests.

It is important that a settled rule should be laid down by the highest court on this subject. At present the Circuit Court of Appeals for the Second Circuit and the Sixth Circuit, on the one hand, and the Circuit Court of Appeals for the Fifth Circuit, on the other hand, are hopelessly at variance. The decision of the Second Circuit was called to the attention of the Judges on the argument in the Fifth Circuit, and they refused to follow it. Unless this Court interposes, there will be a hopeless conflict of opinion between the different circuits.

IV.

If, however, this Court should be of opinion that the writ of certiorari cannot issue under Section 6 of the Act of 1891, then we respectfully insist that we are entitled to a writ of mandamus, and that this is a matter of right under Section 688 of the Revised Statutes, reading as follows:

"The Supreme Court shall have power to issue writs "of prohibition to the District Courts when proceeding "as courts of admiralty and maritime jurisdiction, and "writs of mandamus, in cases warranted by the princi- "ples and usages of law, to any Courts appointed "under the authority of the United States," etc.

The function of the writ of mandamus when issued to an inferior court is to bring up for review all proceedings which cannot be reached by writ of error or appeal, where the Court below has acted without jurisdiction or refuses to exercise its jurisdiction.

Tapping on Mandamus, 105.
3 Blackstone's Com., 110.
Case of Parish St. Balaunce, 1 Pal., 50.
People vs. Justices of Chenango, 1 Johns. Cases, 179.
People vs. Justices of Delaware, 1 Johns. Cases, 181.
Bacon's Abr., 438, Tit. *Mandamus*.

The cases in this Court are very numerous in which the Court has issued its writ of mandamus to compel one of the lower Courts to take jurisdiction of a cause of which it had refused to take jurisdiction. The cases are collated and approved in the opinion delivered by Mr. Justice BRADLEY in the case of *Ex parte Pennsylvania Company, 137 U. S., 451*, although in that case the Court held that the jurisdiction to compel the Circuit Court to resume jurisdiction of a case which it had remanded to the State Court had been taken away by statute.

The subject is considered by MR. Chief-Justice MARSHALL in the case of *Ex parte Crane*, 5 Peters, 190, and again in *Ex parte Bradstreet, 7 Peters, 634*, in which latter case this Court issued its writ of mandamus to compel the Judge of the District Court for the Northern District of New York to take jurisdiction of and try certain issues which the Court had refused to try.

But not only does this Court have the right to issue its writ of mandamus to compel the lower Court to take jurisdiction, but it has the right to issue its writ of mandamus to compel the Court to revoke and set aside decisions made without jurisdiction.

This class of cases does not often arise in this Court, because ordinarily where the Court below assumes jurisdiction full relief can be had by writ of error or appeal from the final judgment or decree of the Court,

and hence there is no need to review the interlocutory proceedings.

This Court, however, in *Ex parte Bradley, 7 Wall., 364*, issued its writ of mandamus requiring the Supreme Court of the District of Columbia to revoke and vacate its order disbarring one of the counsellors of that Court, the writ being issued on the ground that the Supreme Court of the District of Columbia had exceeded its jurisdiction, and, being one of the inferior courts of the United States, its decision in this respect could be reviewed by the writ of mandamus under Section 688.

The same was held in *Ex parte Robinson, 19 Wall., 505*, where this Court issued its writ of mandamus directed to the Judge of the District Court of the United States for the Western District of Arkansas, requiring him to revoke an order disbarring an attorney and to reinstate him, the writ being granted likewise on the ground of want of jurisdiction. See opinion by Mr. Justice FIELD.

See also *Virginia vs. Rives*, 100 U. S., 313, where the Court say (at p. 324), speaking of the writ of *mandamus:* " One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds."

The case now before the Court comes clearly within these authorities. There was a total lack of jurisdiction on the part of the Circuit Court of Appeals to review or reverse or vacate the order appointing the Receiver. No final judgment or decree having been entered, the remedy by writ of error or appeal will not avail. The only remedy is by *mandamus* or *certiorari*.

V.

Assuming that the Circuit Court of Appeals had no jurisdiction of the question of Receivership, we submit that this Court has the power, and, in the absence of any other adequate remedy, it is its duty to issue a writ of mandamus to the Circuit Court of the United States for the Northern District of Florida, commanding that tribunal to disregard those portions of the order and mandate of the said Court of Appeals, which assume to reverse the orders affecting the Receivership, and further commanding said Circuit Court to maintain in force and execute its own orders in respect to the Receivership.

It will be observed that our proposition assumes that the Circuit Court of Appeals has attempted to usurp a jurisdiction not conferred by law. Its action is, therefore, absolutely null and void, and, according to well-settled principles, can be attacked collaterally. In every case where a Court acts absoluteiy without jurisdiction, its action may be disregarded at all times and in all places.

People vs. Riley, 25 Hun, 587.
Kamp vs. Kamp, 59 N. Y., 212.
Hall vs. U. S. Reflector Co., 31 Hun, 609; affd., 96 N. Y., 629.

If an inferior or an intermediate Court acts without jurisdiction, all parties may treat its action as void at the risk of their opinion to that effect being confirmed by the court of last resort. All courts constantly decide the question of their own jurisdiction. It is

only Courts of last resort that can finally and absolutely decide upon their own jurisdiction.

Where a system of intermediate appellate Courts exists, such as those created by the Evarts Act, there must be some mode of having the question of the *jurisdiction* of these appellate Courts determined by the Supreme Court, or else a most anomalous and chaotic condition will arise. We are not now dealing with the mere inconvenience of having variant decisions of the same question in the different Courts of appeal. Such an inconvenience already exists throughout the United States, and Congress may or may not see fit to provide a remedy by giving the Supreme Court of the United States the power to determine which of the conflicting declarations of the law is correct. Notwithstanding this inconvenience, each Circuit Court must and safely can obey and enforce the decisions of its Court of Appeals where such decisions *are within the jurisdiction of such Court.* But where the Circuit Court of Appeals has absolutely no jurisdiction of the question before it, its decision is absolutely void. What, then, is the Circuit Court to do? Suppose the Circuit Judge should disobey the appellate court and disregard its mandate. The result might be that he would find himself in jail, and then a *habeas corpus* from the Supreme Court of the United States would raise the jurisdictional question. Is it not absurd to suppose that the Evarts bill has created a system of courts under which a final adjudication of the Supreme Court of the United States upon the rights of litigants, and upon the construction of the law of the land, can only be obtained in case the United States Circuit and District Judges are willing to take the risk of going to jail for contempt?

It follows, we submit, that (1) either there must be a direct mode by which the parties litigant can carry this jurisdictional question from the Circuit Courts of Appeal to the Supreme Court, or else (2) they can settle the same question by an application for a

mandamus from the Supreme Court to the Circuit. In other words, either a *certiorari* or a *mandamus* will issue from the Supreme Court to the Courts of Appeals, or else a *mandamus* will issue from the Supreme Court to the Circuit Courts.

We insist that a *mandamus* to the Circuit Court is a proper remedy in this case, even though by some other process, such as *certiorari* or *mandamus* to the Circuit Court of Appeals, this Court is able to review *directly* the action of the latter Court.

We insist further that if by reason of defective legislation, or otherwise, this Court has no power to bring up the action of the Circuit Court of Appeals *directly* for a review, then the *mandamus* to the Circuit Court should issue as a matter of right.

(1)

One of the ancient, well-settled functions of the writ of mandamus was to compel an inferior court to proceed to the execution of its own judgment, or the enforcement of its own decree where it was pausing, hesitating or refusing to so proceed on account of some void proceeding taken by itself or some superior tribunal.

(a) Where an inferior tribunal, having no power to set aside a verdict, has assumed jurisdiction to do that thing, *mandamus* will issue from the higher Court to compel the inferior Court to disregard its own illegal and void action, and to enter judgment and issue execution on the verdict.

Brooks vs. Ewers and wife, 1 Strange, 113.
Bayly vs. Boorne, 1 Strange, 392.
People vs. Justices of Chenango, 1 Johnson's Cases, 180; 2 Caines, 349.
Haight vs. Turner, 2 Johnson, 371.
Forman vs. Murphy, 2 Pen. (N. J.), 577 (1024).
Rex vs. Peters, 1 Burrows, 568.
Cortilyou vs. Ten Eyck, 2 Zab., 45.

Fish vs. Weatherwax, 2 Johns. Cas., 215; 2d Ed., note.
People vs. Bacon, 18 Michigan, 247.
Terhune vs. Barcalow, 6 Halst. (N. J.), 38.

In all the above cases the inferior court is refusing to execute its judgment because of its own illegal procedure, which is absolutely void. In these cases the King's Bench, or the Supreme Court as the case may be, is not deterred from issuing a mandamus, because it might issue a *certiorari* which would bring up *directly* the void judicial procedure. The judicial action in question being void, the Court pronounces it such, in a certain sense, *collaterally* and issues its *mandamus*.

(b) Laird vs. Abrahams, 3 Green (N. J.), 22 (1835).

The above case is directly in point. It is a decision by the Supreme Court of the State of New Jersey, where the common law practice prevails, and where the propriety of the use of the writ of *mandamus* is always determined by a reference to the practice in the Court of King's Bench. The facts were as follows:

A Justice of the Peace gave judgment in an attachment proceeding against a garnishee. The defendant took an appeal to the Court of Common Pleas (the County Court), which appeal was granted by the Justice and was entertained by the Appellate Court which reversed the judgment below. The Appellate Court of necessity adjudicated that it had jurisdiction of the appeal. The situation was precisely the same as that of the Circuit Court of the Northern District of Florida and the Circuit Court of Appeals in the case at bar. The Justice refused to issue execution "upon the the ground that there had been an appeal to the Court of Common Pleas," which Appellate Court had reversed his judgment.

In this posture of affairs application was made to the Supreme Court of New Jersey for a mandamus to compel the Justice to issue an execution on the judgment, notwithstanding the action of the Appellate Court. The Supreme Court granted the mandamus.

The opinion of the Court (by Chief-Justice HORNBLOWER) says (p. 24): "The reason assigned by the Justice for refusing to issue an execution is that the defendant *in scire facias* has appealed to the Court of Common Pleas of Monmouth County, and that that Court has reversed his decision or judgment in the matter. *Whether a mandamus ought to issue or not depends, therefore, upon the question whether an appeal lies to the Court of Common Pleas from such a proceeding before a Justice.*"

The Chief-Justice then considers the question of the appealability of the judgment in attachment, and finds that no appeal was given by the statute in that particular case. In other words, the Court of Common Pleas, with its wide statutory appellate jurisdiction over judgments of Justices of the Peace, had no such jurisdiction in that particular case.

The Court proceeds (page 25):

"But it is objected by the counsel for the defendant that a *mandamus* will not to be allowed, where the party has another specific legal remedy, as it is insisted, he may have by a *certiorari* in this case, to the Common Pleas. The King vs. Archbishop of Canterbury, 8 East., 213, 5 Com. Dig., 31, and the State vs. Holliday, 3 Halst., 205, are cited in support of this objection. The unauthorized and illegal proceedings of the Common Pleas, it is true, may be set aside on *certiorari*, but that is not an appropriate or adequate remedy. It would not give the plaintiff an execution against the garnishee, nor advance him in the prosecution of his suit against the absconding debtor. It is not therefore, the *specific* and *legal* remedy, contemplated by the authorities just cited. If, indeed, the Common Pleas had jurisdiction in the case, that of the Jus-

tice would be superseded by the appeal—a *certiorari*, then, would be the only and specific remedy ; but such is not the case."

This means that the obstacle in the way of the enforcement of the judgment was a void judgment of the appellate court; that the appellate court usurped jurisdiction which the statute creating it had not conferred, and which therefore it did not possess; that it was not a case of ordinary *error* on the part of the appellate court in deciding a question of which it had jurisdiction, in which case the remedy would be by *certiorari ;* that parties litigant who have obtained judgments or decrees in inferior courts which are arreste ! not merely by an *erroneous* but by a *void* course of procedure in a higher court, are not required where there is a court of King's Bench over all, equipped with the writ of mandamus to pursue the slow and circuitous process for the removal of the obstacle by a direct attack through a writ of *certiorari.*

The Court proceeds (p. 26) :

" It is argued, however, that if a mandamus is awarded in this case, it must be because the Justice has *erred* in granting an appeal ; and then a writ of *mandamus* will supersede the writ of *certiorari* in all cases where an appeal has been improperly granted by a Justice, or improperly entertained by the Court of Common Pleas. This does not follow. *The fallacy of the argument lies in confounding an irregular appeal,* where an appeal might under some circumstances be regularly brought, *with a case in which there can under no circumstance be an appeal.* If this had been a proceeding before a Justice, of which the Court of Common Pleas, under certain circumstances, had an appellate jurisdiction, no mandamus could issue ; the remedy would *be* by *certiorari.* But as it is a matter of which the Common Pleas has no such jurisdiction, the granting of the appeal by the Justice was a nullity, and the trial of it in the Common Pleas *coram non judice. The*

difference lies between an irregular proceeding and a void one. This is the latter.

This old and well-considered New Jersey case is on all fours with the one at bar. In each case we have an inferior court of original jurisdiction in which a judgment is rendered—the Justice's Court in one case, the United States Circuit Court in the other.

In each case we have a tribunal one step higher having an extensive but strictly statutory appellate jurisdiction—the Court of Common Pleas in one case, the United States Circuit Court of Appeals in the other.

In each case we have the Appellate Court assuming to entertain an appeal and reverse the judgment or order of the Inferior Court, when in fact the particular case was not within its statutory appellate jurisdiction.

The New Jersey Supreme Court, notwithstanding that it might have corrected the action of the lower appellate court, by *certiorari*, granted a *mandamus* directly to the court of original jurisdiction, commanding it to disregard the void judgment of the appellate court.

We submit that this Court has the same power to act directly upon the Circuit Court in Florida, and should exercise that power *ex debito justitiae* if no *certiorari* or *mandamus* can issue to the Circuit Court of Appeals.

Even if the latter remedies or one of them are open to us, there are strong reasons, as in the New Jersey case, why they do not supply the "specific and legal remedy" which can exclude the use of the writ of mandamus.

(2)

The general rule is that a *mandamus* will be issued to a Court or judicial tribunal only to direct the Court to proceed, but not to direct it how to proceed or what particular judgment to give.

Roberts vs. Holsworth, 5 Halst., 57.
Squier vs. Gale, 1 Halst., 157.

To this general rule there is an exception in cases where the thing sought to be commanded is one that the Court to which the writ is sent has no discretion to refuse, as, for instance, to compel the giving of judgment on a verdict where the Court has no power to set aside the verdict, or to award execution on a judgment where the Court has no power to withhold it.

Benedict vs. Howell, 10 Vroom (N. J.), 222.

If the action of the Circuit Court of Appeals was beyond its jurisdiction and void, then the Circuit Court in Florida has absolutely no discretion. The Circuit Court is bound to give the American Construction Company the relief to which it was adjudged entitled.

If, on the other hand, the action of the Circuit Court of Appeals was within its jurisdictionand valid, which is the other alternative, then the Circuit Court in Florida has absolutely no discretion. It is bound to respect and obey the mandate of the appellate court.

Thus it is plain that in no case has the Circuit Court in Florida the slightest discretion in regard to what action it shall take or refrain from taking.

All that the Circuit Court requires is to have an authoritative determination on this question of the jurisdiction of the appellate court, which determination from the nature of the case, can only be made in the Supreme Court.

VI.

The decision of the Circuit Court of Appeals operates as a gross hardship to the Receiver and to persons who have dealt with him on the faith of his authority.

The order of the Court of Appeals reverses absolutely the orders appealed from, except as to the injunction as modified, and vacates the receivership ab-

difference lies between an irregular proceeding and a void one. This is the latter.

This old and well-considered New Jersey case is on all fours with the one at bar. In each case we have an inferior court of original jurisdiction in which a judgment is rendered—the Justice's Court in one case, the United States Circuit Court in the other.

In each case we have a tribunal one step higher having an extensive but strictly statutory appellate jurisdiction—the Court of Common Pleas in one case, the United States Circuit Court of Appeals in the other.

In each case we have the Appellate Court assuming to entertain an appeal and reverse the judgment or order of the Inferior Court, when in fact the particular case was not within its statutory appellate jurisdiction.

The New Jersey Supreme Court, notwithstanding that it might have corrected the action of the lower appellate court, by *certiorari*, granted a *mandamus* directly to the court of original jurisdiction, commanding it to disregard the void judgment of the appellate court.

We submit that this Court has the same power to act directly upon the Circuit Court in Florida, and should exercise that power *ex debito justitiae* if no *certiorari* or *mandamus* can issue to the Circuit Court of Appeals.

Even if the latter remedies or one of them are open to us, there are strong reasons, as in the New Jersey case, why they do not supply the "specific and legal remedy" which can exclude the use of the writ of mandamus.

(2)

The general rule is that a *mandamus* will be issued to a Court or judicial tribunal only to direct the Court to proceed, but not to direct it how to proceed or what particular judgment to give.

Roberts vs. Holsworth, 5 Halst., 57.
Squier vs. Gale, 1 Halst., 157.

To this general rule there is an exception in cases where the thing sought to be commanded is one that the Court to which the writ is sent has no discretion to refuse, as, for instance, to compel the giving of judgment on a verdict where the Court has no power to set aside the verdict, or to award execution on a judgment where the Court has no power to withhold it.

Benedict vs. Howell, 10 Vroom (N. J.), 222.

If the action of the Circuit Court of Appeals was beyond its jurisdiction and void, then the Circuit Court in Florida has absolutely no discretion. The Circuit Court is bound to give the American Construction Company the relief to which it was adjudged entitled.

If, on the other hand, the action of the Circuit Court of Appeals was within its jurisdictionand valid, which is the other alternative, then the Circuit Court in Florida has absolutely no discretion. It is bound to respect and obey the mandate of the appellate court.

Thus it is plain that in no case has the Circuit Court in Florida the slightest discretion in regard to what action it shall take or refrain from taking.

All that the Circuit Court requires is to have an authoritative determination on this question of the jurisdiction of the appellate court, which determination from the nature of the case, can only be made in the Supreme Court.

VI.

The decision of the Circuit Court of Appeals operates as a gross hardship to the Receiver and to persons who have dealt with him on the faith of his authority.

The order of the Court of Appeals reverses absolutely the orders appealed from, except as to the injunction as modified, and vacates the receivership ab-

solutely, and sets aside the order authorizing the issuing of Receiver's notes without making any provision for the protection of the Receiver, or of the parties who have taken the notes.

This matter was brought specifically to the attention of the Court of Appeals by a petition for rehearing which is certified to as a supplement to the record, and is part of the papers filed on this application.

By the order of the Circuit Court, made August 5th, 1892, upon petition of the Receiver, he was authorized to pay such sums as he might find to be due and payable by the railway company, as semi-annual interest on the collateral trust bonds of the Jacksonville, Tampa and Key West Railway Company, then past due, having come due on the first day of August, 1892, amounting to $73,500, and certain other interest and also certain equipment notes "and to make renewals of obligations of said company as the same respectively fall due, said interest and obligations to be paid out of the incomes of its said railways in his hands, or from any moneys that may come into his hands as such Receiver; and, if such income or such moneys shall not be sufficient to pay the said interest and obligations, that he may issue his Receiver's notes in payment of the interest and obligations of the company, or, at his discretion, borrow money on his Receiver's notes to pay such interest and obligations. The amount of such notes, however, outstanding at any one time, shall not exceed $125,000" (p. 85 of the Record).

In the petition for rehearing, filed in the Circuit Court of Appeals, the attention of that Court was called to the fact that it omitted from its decree proper and suitable direction to the Court below in respect to the settlement of the Receiver's accounts and his discharge, and the petitioner asked that the decree of the Court should be so modified "as not to preclude the Court from allowing the Receiver appointed in this case due and ample time to settle his accounts as such

Receiver, and to pay any indebtedness he has incurred, his obligations for which are in the hands of innocent and *bona fide* holders for value."

It was further objected "that the Court had erred in so framing its order as to preclude the Court below from ordering and decreeing that all certificates or notes of the Receiver that may be outstanding in the hands of innocent purchasers without notice be charged as a lien upon the income from the property of the railway company in the hands of the company, or in the hands of any Receiver that may be appointed in the case of the Pennsylvania Company for Insurance on Lives and Granting Annuities, now pending in the Court below."

The petition further set forth "that there are about $60,000 of such certificates and obligations outstanding in the hands of innocent purchasers for value," and "that the said Receiver has paid during his receivership about $150,000 of obligations of the said company, which the said company had neglected to pay prior to his appointment, and which, in the main, were for materials and supplies." These payments were made under the direction and authority contained in clause 5th of the order appointing the Receiver (p. 80 of Record).

The Court of Appeals denied the petition for rehearing, and directed the mandate to issue.

The result of these proceedings in the Court of Appeals is that jurisdiction has been assumed by that Court of an order granting an interlocutory injunction, and under color of such jurisdiction that Court has sustained and modified the injunction and has reversed and vacated an order appointing a Receiver, and has reversed and vacated a subsequent order authorizing the Receiver to pay certain obligations and issue Receiver's notes, and has thereby apparently invalidated the notes issued by the Receiver on the faith of the order of the Court below, and in obedience to the order of the Court below, and has left the Receiver ap-

parently without any protection for his acts as such Receiver. Such a result as this certainly cannot be tolerated.

If the Circuit Court of Appeals had any jurisdiction to make the order, then we submit that that order should be reviewed by this Court upon *certiorari*, and the injustice done thereby should be corrected.

If, on the other hand, as we contend, the Circuit Court of Appeals had no jurisdiction to make the order reversing and vacating the orders of the Court below, as to the receivership, then we submit that this Court should protect the Receiver and those who have acted in reliance upon his authority, by issuing its writ of mandamus or its writ of *certiorari*, as prayed for by us, to set aside the illegal and unjust action of the Circuit Court of Appeals, or to direct the Court below to disregard such action as illegal and void.

VII.

It cannot be contended, we submit, with any plausibility, that the Circuit Court exceeded its jurisdiction in appointing the Receiver in this case, nor can it, we further submit, be seriously disputed that a proper case was made for the appointment of a Receiver in the exercise of the judicial discretion of the Court. We further claim that the Court exercised its discretion properly under the facts before it.

As to jurisdiction, the only point made in the Court below was as to compliance with Equity Rule 94. The Circuit Court of Appeals, however, did not reverse the order appointing the Receiver on any such ground; but, on the contrary, as we have already pointed out, they in effect held that this suit was properly brought, and that the Court below had jurisdiction, for the

reason that they sustained the injunction and modified it.

That Rule 94 does not apply to this case, we think is clear.

The last clause of paragraph 5 of the bill alleges "that this suit is not a collusive one to confer on the United States Courts jurisdiction of a case of which they would not otherwise have cognizance" (p. 4 of the record).

In paragraph 17 of the bill it is alleged that complainant made demand upon the officers and directors of the company to have an expert accountant examine the books of account for the purpose of ascertaining the exact condition of its accounts, and that such demand was refused and denied by the Board of Directors of the defendant company (p. 12).

Paragraph 20 of the bill shows that the complainant has exhausted every effort by applying to the officers of the company to obtain a true and reliable statement concerning the condition of the property and its finances (pp. 14 to 16).

The bill, taken as a whole, shows that the company is under the control of the directors and officers whose acts are complained of, and that any application to them to bring this suit would be useless. Indeed, the suit is brought to require an accounting as to the transactions of these very officers and directors.

Equity Rule 94 is merely declaratory of the principles laid down by this Court in the case of *Hawes against Oakland*, 104 U. S., 450.

In that case the Court, in its opinion, at page 461, recognizes that there are exceptional cases where the rule does not apply. The Court say, after stating what efforts must be made by the stockholder to procure action by the corporation, as follows: "And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

Rule 94 is merely declaratory, as was the case of

Hawes vs. Oakland of the principles of equity as theretofore laid down.

Dodge vs. Woolsey, 18 How., 331.
Robinson vs. Smith, 3 Paige, 222.

The Court could not make the rule otherwise than declarative; it had no power to take away a right of action from any citizen, or to impair by any unnecessary burden, a right theretofore protected by the law of the land.

See U. S. R. S., Sec. 917.

Being declarative, the rule obviously did not intend to embrace those cases where, as theretofore, the acts specified in the rule would be futile or inappropriate. See the bill in

Wardell vs. R. R. Co., 103 U. S., 655.
Gardner Brewer vs. Boston Theatre, 104 Mass., 378.

And see generally other cases in note to

Hersey vs. Veazie, 41 Amer. Decis., 369.
Rogers vs. Lafayette Agricult'l Works, 52 Indiana, 306.
Heath vs. Erie R. R., 8 Blatch., 410.
Booth vs. Robinson, 55 Md., 419, 439.

And such is the better decision of the Federal courts of justice since the rule.

Bill vs. West. Union Tel. Co., 16 Fed.Rep., 18.
Barr vs. Pittsburgh Plate Glass Co. et al., 40 Fed. Rep., 412.
Ranger vs. Champion Cotton Press Co., 52 Fed. Rep., 614.

As to the merits of the bill and the propriety of the appointment of the Receiver on the affidavits, we do not deem it necessary or proper at this stage of the proceedings to enter into detailed discussion. We presume that such a discussion ought properly to be reserved until the Court has determined whether or not it will issue a writ of *certiorari* or *mandamus*.

If, however, this Court should examine the record as to whether there was a *prima facie* case made for the appointment of a Receiver, we think the Court will be satisfied that not only was there such *prima facie* case, but that there was a clearly demonstrated case calling for the appointment of the Receiver to protect the interests of the stockholders.

We shall not undertake here to recapitulate the facts on which the receivership was based. It is sufficient to say that a case was made tending to show a wanton disregard of the rights of the stockholders and the interests of the corporation on the part of the directors in charge of its affairs.

Among other facts appearing by the record were these: The Florida Construction Company, a New Jersey corporation, had a record ownership of a majority of the stock of the railway company (p. 10).

Robert H. Coleman was president of the railway company and also of the construction company, and in absolute control of the affairs of both (pp. 10 and 11).

He caused bills payable of the railway company to be issued, with the proceeds of which he took up the floating debt of the Florida Construction Company, for which the railway company was in no way liable, but upon which he was liable as endorser (p. 11).

At the close of the fiscal year ending June 30th, 1890, the railway company had a floating debt of $243,702.98 (p. 21).

During the fiscal year ending June 30th, 1891, it had net earnings of $257,338.79 (p. 22).

Notwithstanding the fact that these earnings were in excess of taxes and fixed charges, and that no new extensions or constructions were undertaken during that year, nevertheless, at the close of the fiscal year ending June 30th, 1891, its floating debt was $1,787,-784.75 (p. 21).

This increase of more than a million and a half of floating debt during the year was brought about by issuing bills payable as above stated for the debt of the

Florida Construction Company, for which Mr. Coleman, the president of the railway company, was liable as endorser.

The railway corporation was thus saddled with an enormous liability for which it received no compensation and which inured to the benefit of the president of the corporation.

Pending the motion for a Receiver in this suit before Judge SWAYNE, the collusive suit for foreclosure was brought by the Pennsylvania Company for Insurances on Lives and Granting Annuities, and a Receiver was appointed in that suit. Judge SWAYNE correctly held that if a receivership was proper in a foreclosure suit, it was much more proper in this suit, and, as this suit was prior in point of time, and as the property involved in this suit is the entire property of the corporation, while that involved in the other is only a part of the property of the corporation, Judge SWAYNE properly decided that a Receiver should be appointed in this suit, rather than in the foreclosure suit.

Various other facts appeared by the bill and by the affidavits, tending to show gross mismanagement, and also to show the efforts made by the complainant to obtain information and redress.

VIII.

For the reasons above given, we respectfully submit that we are entitled to one or the other of the writs for which we pray.

WM. PENNINGTON,
EUGENE STEVENSON,
WM. B. HORNBLOWER,
Of counsel for Petitioner.

Office Supreme Court U. S.
FILED.
MAR 6 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 14, ORIGINAL.

Ex parte:

IN THE MATTER OF THE AMERICAN CONSTRUCTION COMPANY.

BRIEF FOR JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY, IN OPPOSITION TO APPLICATION FOR MANDAMUS OR CERTIORARI.

THOMAS THACHER,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Florida Construction Company, for which Mr. Coleman, the president of the railway company, was liable as endorser.

The railway corporation was thus saddled with an enormous liability for which it received no compensation and which inured to the benefit of the president of the corporation.

Pending the motion for a Receiver in this suit before Judge SWAYNE, the collusive suit for foreclosure was brought by the Pennsylvania Company for Insurances on Lives and Granting Annuities, and a Receiver was appointed in that suit. Judge SWAYNE correctly held that if a receivership was proper in a foreclosure suit, it was much more proper in this suit, and, as this suit was prior in point of time, and as the property involved in this suit is the entire property of the corporation, while that involved in the other is only a part of the property of the corporation, Judge SWAYNE properly decided that a Receiver should be appointed in this suit, rather than in the foreclosure suit.

Various other facts appeared by the bill and by the affidavits, tending to show gross mismanagement, and also to show the efforts made by the complainant to obtain information and redress.

VIII.

For the reasons above given, we respectfully submit that we are entitled to one or the other of the writs for which we pray.

WM. PENNINGTON,
EUGENE STEVENSON,
WM. B. HORNBLOWER,
Of counsel for Petitioner.